A watershed theory of water rights and their administration in an environment of drought awareness

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There is, of course, a quarter century of regulatory excess preceding the current attempts of the Water Resources Board in partnership with owners and users of water and various surrogates to define the current legal environment of water rights in Rhode Island and to give form to any 'necessary' police power voice in the realm of water allocations. Nonetheless, the greatest of ironies abounds when farmers absolutely refuse to participate in a categoric enumeration of their water use motivated by the quite rational fear that this might be an effort to supplant their water rights with state policies designed to dispossess them. This is because, throughout the history of the United States, use of water has been a part - sometimes even the whole - of the basis for claiming a water right interest. Whether under riparian, appropriative or mixed doctrine, historic use has been a guidepost to future right.

But the same relatively recent regulatory and legal developments which have lead Rhode Island farmers to a suspicious view of Government motives in water use census activity have, indeed, tended to undermine the historic system of water rights in other jurisdictions. Currently, the Rhode Island Department of Environmental Management which has been the central authority in fostering distrust between Rhode Island farmers and Rhode Island governance is inappropriately seizing authority over water allocation by indirectly premising wetlands permits on associated water allocations which are simply not within their jurisdiction.

It is this style of jurisdictional overreach which fostered the legislative exemptions for agriculture from the wetlands laws. These exemptions really do little more than the *de minimus* provisions, which always existed in Rhode Island's wetlands statutes, were intended to do all along. Because the Department of Environmental Management with a purposefulness which belied its arbitrariness, capriciously refused to recognize these *de minimus* limitations on its jurisdiction farmers were able to demonstrate to the legislature that additional protection for agricultural activities was necessary.

This is the unfortunate backdrop which attends efforts which could quantify as much as qualify the water right due to farmers - and all other landowners for that matter. It is a fundamental violation of the basic precepts of the rule of law that farmers may something thing that non-farmers in a similar circumstance may not. Farmers are to be credited with whipping the political will to protect themselves from an overreaching bureaucracy; but, a code of environmental and property law which grants favors to limited constituencies promises, like our tax code, to be a font of cynicism rather than belief that government has found its proper limits.

Indeed, the poor precedent of their treatment in the wetlands realm meant that farmers were all the more determined not to be outflanked in the current iteration of regulatory consideration. Whereas wetlands laws were used to virtually criminalize many of their normal farming activities and they were forced to fight a rear guard action, farmers have been proactive in placing their interests to the fore by protecting agricultural uses in the law which provides for possible development of a regulatory framework related to water allocation. This portends a balkanization of water policy in the winner take all, first come first served basis which has undermined water rights regimes in other states.

Against this backdrop, the refusal of some organized agricultural interests to endorse a water use 'registration' program reveals the fundamental failure of the state's refusal outside the legalistic realm to recognize water rights as property rather than license. There is a preliminary appeal to the impractical idealism of having the state own all the water and then license it, but that is neither good law, i.e. reasonably reflective of the current legal status; nor good economics, i.e. without private ownership of water there is no cost signal for the resource which informs consumption patterns; nor good environment, i.e. it fails to motivate private interest in preserving water quality and quantity.

While the water rights systems of others states have, to varying extents, addressed portions of this conundrum and provide a measure of security in water quantity, no state has a system which begs imitation. On the other hand, much salutary law of other fugacious substances, i.e. oil and natural gas, has more bearing on a relevant property rights construct for better defining water rights - esp. groundwater rights which are, in Rhode Island, at once unlimited and yet so generous as to limit themselves to insignificance.

Management of ownership in fugacious mineral wealth has developed almost universally amongst the states along "correlative" lines. This tends to limit the extractive rights to a share coordinate with the surface ownership over deposits. This has tended to secure property interests and prevent, or allow legal

resolution of, neighborhood feuds over underground wealth which might otherwise have lead to hostilities such as those between Iraq and Kuwait some dozen years ago. Respect for property rights has thus insured the orderly prosecution of resource development.

This is the aspect which farmer's reasonably fear, given regulatory history to date, will be wholly lacking in the state's approach to development of water resources. Indeed, given that regulatory water policy to date has uniformly discouraged storage or retention for drought preparedness it appears that the state's police powers are in conflict with themselves here and the state could do more by removing regulatory burdens on the private sector than placing more with respect to increasing water availability in drought.

This obvious imbalance in state policy could be further remedied by a recognition of the correlative property right in water that both gives rise to a strong if yet well defined groundwater right associate with land ownership and simultaneously attends the touchy feely 'watershed' approach to regulation which the state has adopted. The simple point is that the state wishes for all property owners to run their properties as clean water collectors. Property owners will certainly be more than willing to comply in general should they receive the coordinate right that attends this state imposed responsibility - that is a quantitative water right directly related to the amount of water their property collects.

Such a regime will generally secure the water rights of farmers [but also of non-farm property owners] although it will not grandfather excessive withdrawals which are unrelated to the proportion of land ownership which gives rise to the water right in the first place. The system of riparian rights must be dovetailed with the approach to some extent and serves to secure the surface water rights belonging to public water supplies so it does not portend out of hand disenfranchising consumers who rely on water companies rather than wells. But the reliance of surface water purveyors on neighboring property owners to receive less property rights as a consequence of location in these surface watersheds should be compensated for their loss of value related to the continued security of these supplies. In any event, there is no more fear of ownership of water than there is ownership of food or food supply in the United States. We have one of the world's most privately owned food production systems and we not only vastly prevent our own nation from going hungry but numerous other nations as well. For the state to guarantee its citizens access to drinking and domestic water as any drought allocation paradigm would is quite different from what that water should cost or determining its ownership.

These measures could jump start an economy in water which carries price signals currently unavailable in the water supply industry. Water rates are based on the cost of infrastructure to store and deliver the supply but there is no cost for the resource itself. Bringing such a cost into the price for water service is the simplest and most economically defensible way of having water consumption prerogatives sensibly reflect availability.

The Water rates committee has been looking in a different and less fruitful direction of simply imposing a state mandated nuisance charge on water bills to create a pool of money for various institutionally dependent providers to guide water conservation and PR to convince the public to use less water. Ironically, discussion of the charge focuses around making it as large as it can be without generating much public approbation which is the very opposite of an economic signal. Such an effort is not sensibly targeted to the true or varying state of supply and demand in the industry.

Any property rights in water, as any property rights generally, are subject to reasonable police power regulation to protect the health, safety and welfare of the public. There is a strong state interest in more regimented drought response but it can best be served by creating a robust free market in water in non-emergency circumstances which will only lead to there being more available in droughts anyway.

Farmers do not refuse to delineate their property in deeds which are recorded in the land evidence records of their local towns. This practice has tended to secure property rights over time (albeit they are subject to as much disregard as state environmental bureaucracies can possibly mete out without being caught overstepping legal boundaries). There is no reason that water registration cannot be, and be perceived, as part of an effort to secure and define and uphold legal rights, but as long as there is healthy suspicion that the process is intend to cloud and abrogate private rights with public good euphemisms, no Rhode Islanders, farmers or otherwise, ought to participate.